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No. 93-2040

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SCHENLEY PRESS, INC.

Petitioner

v.

COMPTROLLER OF THE TREASURY
OF THE
STATE OF MARYLAND

Respondent

Petition for Writ of Certiorari to The
Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERQUESTION PRESENTED

IS THERE ANY COMPELLING REASON FOR THIS COURT TO GRANT SCHENLEY'S PETITION FOR WRIT OF CERTIORARI, IN VIEW OF THE FACT THAT THE MARYLAND GENERAL ASSEMBLY HAS CHANGED THE LAW UPON WHICH SCHENLEY'S THEORY OF THE CASE IS PREDICATED?

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I. ADDITIONAL STATUTE INVOLVED

Maryland Annotated Code, Tax-General Article, §11-215(c) (1988, 1993 Cum. Supp.)

> (c) Newspapers. - The sales and use tax does not apply to the printing and sale of newspapers that are distributed by the publisher at no charge.

II. COUNTERSTATEMENT OF THE CASE

Petitioner, Schenley Press, Inc., publishes a monthly publication, the Baltimore Chronicle. The Maryland Comptroller of the Treasury levied a sales and use tax assessment, subsequently adjusted to $6,204.53, on Schenley's taxable purchases for the audit period May 1, 1986 through April 30, 1990. All penalty and interest were abated, and Schenley paid the assessment under protest in June 1992, pending the

resolution of its appeal.

With the exception of a limited number of subscription sales, the Chronicle is distributed free. The sole issue in this case is whether the Comptroller had the legal authority during the audit period to define a newspaper as being published at least weekly so as to deny Schenley an exemption from sales and use tax on its costs of printing issues that are distributed free.[1] COMAR §03.06.01.04A(1)(a) (hereinafter, "the regulation"). The Maryland Tax Court ruled that the regulation was

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[1]Purchases of tangible personal property solely for purposes of resale are not subject to Maryland sales and use tax. Therefore, the printing costs both of large metropolitan dailies and any issues of the Chronicle that are sold on subscription are not subject to tax in any event. The assessment was adjusted accordingly in this case.

inconsistent with the Maryland Sales and Use Tax Act and therefore found it unnecessary to address Schenley's First Amendment challenge to the regulation.[2] The Circuit Court for Baltimore City reversed the Tax Court's statutory ruling and held that the First Amendment does not require the State to extend the sales tax exemption for newspapers to publications that are published less frequently than weekly.[3] The Maryland Court of Special Appeals affirmed in an

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[2]Although Schenley's petition purports to raise a claim under the Fourteenth Amendment, Pet. at 4, in fact Schenley at no time raised such a claim in the Maryland courts.

[3]The Circuit Court's dicta "that the Baltimore Chronicle certainly deserves the appellation of a newspaper", Pet. App. at 18, in no way negates the Court's holding that the First Amendment does not compel the State to consider the Chronicle to be a newspaper for sales tax purposes.

unreported opinion. The Maryland Court of Appeals denied Schenley's petition for a writ of certiorari.

Schenley advances two arguments in support of its position, both of which were considered and properly rejected by the Maryland courts. First, Schenley maintains that the frequency of publication requirement tends to suppress particular ideas, because the effect of the regulation is to exempt large metropolitan dailies from the sales tax, while excluding "community newspapers" that are published less frequently than weekly from the exemption.[4] The Court of Special

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[4]At no time has Schenley introduced any evidence whatsoever comparing free "community newspapers" that are published less frequently than weekly with those that are published at least weekly. Therefore, the record fails to disclose whether the viewpoints, readers

Appeals correctly held that the regulation is a content-neutral requirement that does not have the purpose or effect of suppressing speech within the meaning of Leathers v. Medlock, 499 U.S. 439 (1991), as the burden of the generally applicable sales and use tax does not fall on only a

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or financial condition of those newspapers vary in any way based on frequency of publication. In addition, the record is devoid of any evidence of the number of free "community newspapers" that are published or circulated in Maryland, either in total, at least weekly, or less frequently. All that can be inferred from the evidence Schenley offered in the Tax Court is that it is likely that 60% of these newspapers are published at least weekly and are thus exempt from Maryland sales and use tax.

limited number of speakers.[5] Pet. App. 33 - 39.

Next, Schenley maintains that the First Amendment prohibits so-called "intra-medium" discrimination, without any showing of a purpose or effect of suppressing speech. The Court of Special Appeals correctly noted that Leathers held that it is immaterial whether disparate tax treatment is

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[5]Schenley's reliance on Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987), Grosjean v. American Press Co., 297 U.S. 233 (1936) and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) is clearly misplaced. Unlike the generally applicable Maryland sales and use tax, the taxes at issue in Grosjean and Minneapolis Star were imposed exclusively upon the press or segments thereof. Similarly, the tax exemption at issue in Arkansas Writers' Project was so broad that the burden of the tax ultimately fell on a very limited number of speakers. Schenley did not, and cannot, show that the Chronicle bears a disproportionate burden of the Maryland sales and use tax.

denominated as inter- or intra-medium discrimination, and that the States may constitutionally exempt some segments of the media from a generally applicable tax, while taxing other similar segments. Pet. App. 33 - 39.

III. REASON FOR DENYING THE WRIT

There is no compelling reason for this Court to grant Schenley's petition, as the Maryland General Assembly has amended the Maryland Sales and Use Tax Act and the disparate tax treatment of which Schenley complains has therefore been eliminated.

The Court of Special Appeals clearly decided this case correctly. However, even assuming arguendo that the disparate tax treatment at issue herein was unconstitutional during the audit period, the Maryland General Assembly subsequently amended the Maryland Sales and Use Tax Act and thereby eliminated

this disparity in treatment. As of May 1, 1992, the statute was amended to remove the sales tax exemption for large metropolitan daily newspapers. Tax-General Article, §11-215(c) (1988, 1993 Cum. Supp.). Therefore, Schenley is no longer treated differently for purposes of the sales tax exemption for newspapers than are large metropolitan dailies.

IV. CONCLUSION

For all these reasons, this Court should deny Schenley's petition for writ of certiorari.

Respectfully submitted,

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